

PUBLIC SERVICE STAFF RELATIONS ACT
BEFORE THE PUBLIC SERVICE STAFF RELATIONS BOARD

BETWEEN:

JEAN-LUC PATENAUDE,

file library
grievor,

- and -

TREASURY BOARD
(Department of Transport)

M
employer.

*NOW LTR 5/85
SICHTCHANGERS*

DECISION

Before: S.J. Frankel, Board Member and Adjudicator

For the Grievor: Catherine H. MacLean, Counsel

For the Employer: Pierre Hamel, Counsel

*LTR 6/78
CODE 402/79*

- letter of agreement on Probation's application to Supervisors

Heard at Ottawa June 15, 1979; Quebec City August 27, 1979;
Ottawa October 31, 1979.

- Grievance upheld -

Ruling: - probation ceases upon check-out for Superv. same as Controller

DECISION

1. The grievor, Mr. Jean-Luc Patenaude, is an Air Traffic Controller (AI-3) currently in the position of Shift Supervisor at the Quebec Control Tower. On or about September 23, 1978,* he filed the following grievance:

Suite au concours 77 MOT-AQ-CC-221 on m'a fait un offre d'emploi avec une période de probation de un (1) an. Ceci est contraire à la lettre 6-78 du 27 janvier 1978 de l'entente CATCA-CT.

(Translation: As a result of competition no. 77 MOT-AQ-CC-221 I was offered a position subject to a probationary period of one year. This is contrary to the letter 6-78 of January 27, 1978, of the CATCA-TB agreement.

The corrective action requested by the grievor was that the probationary period end with the completion of his training.

2. The grievance was denied by the employer and following is the response to it at the final level:

Nous avons soigneusement étudié le grief dans lequel vous demandez que la période de stage probatoire du poste de surveillant de quart se termine avec la fin de votre formation et nous en avons discuté avec les représentants de votre association.

La lettre d'accord n° 6/78 ne s'applique qu'aux fonctions techniques d'un poste. La période de stage des postes de surveillants et d'administration est régie par l'article 28 de la Loi sur l'emploi dans la Fonction publique et par l'article 30 du Règlement sur les conditions d'emploi dans la Fonction publique.

*The original grievance form shows September 3, 1978, as the date the grievance was received at the first level. It was agreed by the parties at the hearing that this was an error and that the date was more likely September 23. This is supported by the fact that the offer was accepted on September 18 and the first-level reply to the grievance is dated October 4, 1978.

Votre grief est donc rejeté.

(Translation: We have carefully examined the grievance in which you request that the probationary period for the position of shift supervisor end with the completion of your training and we have discussed it with the representatives of your association.

The letter of understanding no. 6/78 applies only to the technical functions of the position. The probationary period for supervisory and administrative positions is subject to section 28 of the Public Service Employment Act and section 30 of the Terms and Conditions of Employment Regulations.

Your grievance is therefore denied.)

3. During the summer of 1978 there was a competition to fill three positions of shift supervisor in the Quebec Terminal Control Unit (Terminal Shift Supervisor). Mr. Patenaude was one of the three successful candidates in this competition. Because there was a requirement for the completion of a language test for this position, the three successful candidates were assigned the duties of terminal shift supervisors (AI-4) on an acting basis as of June 1, 1978 (Exhibit E-1). The grievor satisfied the language requirements during the summer months and received a letter, dated September 6, 1978, offering him a position as Terminal Shift Supervisor. Identical letters were sent to the other two successful candidates (Exhibit E-2). The key paragraph in this letter reads as follows:

Une nomination à la suite de cette offre sera sujette à une période de stage de la durée de votre "check out" pour la partie compétence opérationnelle de vos fonctions et une période de stage de douze (12) mois pour l'aspect administratif de vos fonctions comme surveillant.

(Translation: An appointment based on this offer will be subject to a period of probation to last until your "check out" for the operational aspect of your duties, and a probationary period of twelve (12) months for the administrative aspects of your duties as a supervisor.

4. The probationary requirement had been questioned at an earlier stage by two of the successful candidates (one of whom was Mr. Patenaude) and the staffing officer with whom this question was raised took the matter up with the management of the Quebec terminal. The employer's position on the question of probation is made clear in the letter of offer.

5. Attached to the letter of offer to Mr. Patenaude was a form on which he was required to indicate whether or not he was accepting the offer. The grievor completed the form on September 18, 1978. He indicated his acceptance of the offer by putting a check mark in the proper space and he added at the bottom of the form the following:

Je conteste l'application de la période de probation de douze mois en vertu de la lettre d'entente 6-78 du contrat CATCA-CT.

(Translation: I challenge the requirement of a twelve month probationary period by virtue of the letter of understanding 6-78 of the collective agreement CATCA-CT.)

It was management's interpretation that Mr. Patenaude's response did not constitute an acceptance of the offer. This interpretation was upheld by the Public Service Staff Relations Board in a decision dated May 9, 1979 on complaints filed by the grievor and one other person under section 20 of the Act. The majority of the Board concluded that the complaints were not well-founded - Patenaude et Letellier de St-Just (Board files: 161-2-181/182).

6. Mr. Patenaude filed his grievance after returning the form in which he indicated his acceptance of the offer and at the bottom of which he noted his objection to the probationary period. In his view he had accepted the offer. The note at the bottom was added so that it would be clear that he was not waiving his rights to grieve against what he believed to be an improper application of the collective agreement. The Letter of Understanding in question is one of eight that are appended to the collective agreement between the Treasury Board and the Canadian Air Traffic Control Association, January 1-December 31, 1978. It is here reproduced in full:

LETTER OF UNDERSTANDING NO. 6-78

January 27, 1978

Mr. W.J. Robertson,
Vice President,
Canadian Air Traffic
Control Association,
1 Nicholas Street,
Suite 1216,
Ottawa, Ontario.
K1N 7B7

Dear Mr. Robertson:

This letter will confirm an understanding reached during the current Air Traffic Control Negotiations in respect to probation.

It is agreed that the period of probation for Air Traffic Controllers who must successfully complete classroom and/or on-the-job training prior to their appointment to a position shall terminate on the date of the check-out.

This agreement does not apply to air traffic controllers in training (AI 00)

until such time as they are promoted to a position above that level.

Yours very truly,

P.V. Dawson,
Director,
Employee Relations.

Received and accepted this
27th day of January, 1978, by

W.J. Robertson,
Vice-President, Canadian Air
Traffic Control Association.

7. On March 2, 1978, the Deputy Minister of Transport issued Circular No.: 78-09100-034 entitled PROBATIONARY PERIOD FOR AIR TRAFFIC CONTROLLERS (Exhibit G-2). The circular referred to the authority of a Deputy Head to waive or reduce the probationary period prescribed under the Public Service Employment Act and Regulations. It reproduced the Letter of Understanding 6-78 and included the following:

PURPOSE

The purpose of this circular is to give effect to the memorandum of understanding dated January 27, 1978 concerning probation for Air Traffic Controllers.

POLICY

The probationary period will be waived for all Air Traffic Controllers, except Air Traffic Controllers in Training (AI 00), who are required to successfully complete classroom and/or on the job training prior

to their appointment from within the Public Service to a higher air traffic control level.

8. By letter dated October 3, 1978, Ms. J.L. Leduc, the Regional Staffing Officer, advised Mr. Patenaude that all staffing action in connection with this offer would remain in suspension pending the final outcome of his grievance (Exhibit G-1). On October 19th, Mr. Claude Desnoyers, the Acting Unit Chief, sent a memorandum to Mr. Patenaude advising him that he would be relieved of his position as Acting Shift Supervisor (AI-4) as of October 20, 1978. Again in this memorandum, the reasons for the action are attributed to Mr. Patenaude's grievance with respect to the probationary period, and there is an indication that further staffing action with respect to the position of supervisor would await the final disposition of the grievance (Exhibit G-3).

9. The above facts were adduced at the hearing in Quebec City on August 27, 1979. There was also some evidence of discussions, sometimes heated, between Patenaude and various members of management. The issues raised in these discussions had to do with the probationary requirement, the status of Patenaude's letter of acceptance, and the fact that he had filed a grievance. This evidence, however, is not material to the matter in issue before me.

10. Against this background evidence Mr. Hamel, counsel for the employer, raised, as a preliminary matter, the question of Mr. Patenaude's status as a grievor and the Board's jurisdiction to entertain this reference to adjudication. He referred to the representations he had made on behalf of the employer in a letter of May 16, 1979, addressed to the Public Service Staff Relations Board. The letter reads as follows:

...../7

This is to raise a preliminary matter in regard with the jurisdiction of the Board to entertain the reference to adjudication in the case mentioned above.

The Employer wishes to bring to the Board's attention the following facts: the grievor applied for a position of Terminal Control Unit Supervisor (AI-4) in Québec; a closed competition was held, bearing no. 77-MOT-AQ-CC221 and the grievor's name appeared on an eligibility list dated March 23, 1978. An offer was made to the grievor for that position on September 6, 1978. The grievor has not, to this date, been appointed to the said position. Therefore Mr. Patenaude is not on probation at the moment nor has he ever been subject to the probationary period provided for the position he has applied for, and which is the subject of the case at hand.

Section 91(1)a of the Public Service Staff Relations Act reads as follows:

91(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to

(a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or

(b) (...)

and his grievance has not been dealt with to his satisfaction, he may refer the grievance to adjudication.

In his grievance, Mr. Patenaude seeks the interpretation of the letter of understanding no. 6-78 dealing with the period of probation in respect of a position which he was offered, but to which he was not appointed. This being the case, an adjudicator's decision as to the manner in which the letter should be construed, were the adjudicator to deal with the merits, would not and could not possibly

apply to Mr. Patenaude. Therefore, the grievor lacks the sufficient interest as required by s. 91(1)a of the Act in order to refer this grievance to adjudication.

In light of the facts mentioned above, it is clear that the grievor seeks an interpretation of the letter of understanding that does not apply to him in this particular case. Mr. Patenaude's grievance falls outside of the jurisdictional frame of the adjudicator as set out in s. 91(1)a of the Act, which stresses out in a very clear manner that only those grievances that are dealing with the interpretation in respect of the grievor of a provision of a collective agreement (or the letter of understanding as it is the case here) may be referred to adjudication.

In light of the foregoing, the Employer requests the Board to dismiss the grievance on its face for lack of jurisdiction, in accordance with s. 87 of the P.S.S.R.B. Regulations and Rules of Procedure. The Employer is prepared to bring forward any further oral representations in support of his motion at an early date convenient to the Board and both parties.

11. This letter was transmitted to counsel for the grievor who replied on May 22, 1979, as follows:

Thank you for your letter of May 17th, 1979, with the enclosed copy of Mr. Hamel's Application to dismiss Mr. Patenaude's grievance for lack of jurisdiction.

The facts which Mr. Hamel set out in his letter are not complete. The facts upon which we rely in support of our request that the Board reject Mr. Hamel's Application are as follows:

- 1) The grievor entered competition 77-MOT-AQ-CC-221 for the position of Terminal Supervisor AI-6 (new

- classification AI-4) at Quebec City.
- 2) He placed second on the eligible list which was formed as a result of the competition.
 - 3) At the time of the competition he was a supervisor in the Quebec Tower, AI-5 (new classification AI-3).
 - 4) By letter dated May 26th, 1978, Mr. Letellier de St. Just who was number three on the eligible list was offered a position as Terminal Supervisor.
 - 5) The letter stated that the appointment would be subject to a probationary period of twelve months.
 - 6) Mr. Letellier de St. Just accepted the position but queried the twelve months probationary period in view of Letter of Understanding 6-78 of the Collective Agreement between C.A.T.C.A. and Treasury Board.
 - 7) After Mr. Letellier de St. Just's response to this offer, Messrs. Patenaude and Langevin, who had placed number one on the eligible list, passed the language exam which was required before they could receive a similar offer.
 - 8) The appropriate Staffing Officer consulted with his superiors to determine whether there should be a twelve month probationary period in view of the Letter of Understanding.
 - 9) The grievor was appointed to the position of Terminal Supervisor in an acting capacity as of June 1st, 1978.
 - 10) By letter dated September 6th, 1978, Messrs. Letellier de St. Just, Langevin and the grievor were offered positions as Terminal Supervisors with

a twelve month probationary period for the administrative aspect of their functions.

- 11) On September 18th, 1979, the grievor submitted a response form indicating that he accepted the job. At the bottom of the form he made a notation contesting the twelve month probationary period.
- 12) On October 3rd, 1978,* (not September 3rd as the grievance form indicates) the grievor submitted his grievance concerning the twelve month probationary period which forms the subject of this reference to adjudication.
- 13) The employer determined that Mr. Patenaude's response forced them to suspend all Staffing action at Mr. Patenaude's level and below on the eligible list until his grievance was resolved.
- 14) On October 13th, 1979, Mr. Langevin stated that he accepted the offer of appointment according to the terms of the Public Service Employment Act and the Collective Agreement. He was appointed to the position of Terminal Supervisor, Quebec Terminal.
- 15) In October, 1978, the grievor was removed from his acting position as Terminal Supervisor. He was ultimately returned to his position as Tower Supervisor.

It is submitted in light of the facts outlined above that it is irrelevant that Mr. Patenaude was never appointed to the position which he was offered. This grievance clearly involves the "interpretation or application of a Collective Agreement" in respect of him. The interpretation will determine whether he receives the appointment.

* see footnote p. 1

It is clear that if the Adjudicator granted Mr. Patenaude's grievance on the merits, the grievor would be entitled to a permanent appointment to the position of Terminal Supervisor in Quebec City as of September 6th, 1979. This would constitute a promotion for him. It is hard to imagine a case in which a grievor has a stronger personal interest in the interpretation of a Collective Agreement.

We would, therefore, ask the Board to rule that it has jurisdiction to hear this case. If the Board requires any further representations, either oral or written, we should be pleased to make them.

12. In their oral submissions counsel added little that was new to their written representations in this matter. Mr. Hamel re-emphasized the argument that since Mr. Patenaude had not accepted the position and was therefore not appointed to it, it could not be said that he was subject to a probationary period. Patenaude knew that the employer would regard his conditional "acceptance" to be a nullity. He was not led into a false sense of security with regard to the conditions of the proposed appointment and, as a person with some union experience, he should have known that he would not have waived his right to file a grievance if he had accepted the offer without recording the reservation. Thus, since Patenaude was not appointed to the position, it cannot be said that the interpretation or application of the collective agreement was "in respect of him". In any case, even if the employer had misinterpreted the Letter of Understanding, the issue remained academic since the grievor had no claim to the position to which he had never been appointed. The staffing process is quite distinct from the grievance process and an adjudicator cannot purport to make a staffing decision.

13. Ms. MacLean, counsel for the grievor, reiterated the position that whether or not Mr. Patenaude had been technically appointed to the position offered to him was irrelevant. The point is that because of a wrong interpretation of the Letter of Understanding by the employer, Patenaude is still an AI-3 and not an AI-4, which he would have been had the collective agreement been properly interpreted. The grievance is therefore very much "in respect of him"; his interest is direct and significant. While counsel was now prepared to allow that it might not be possible for an adjudicator to grant relief by way of an order that Patenaude be appointed to the position of Terminal Shift Supervisor at Quebec, or to an equivalent position, the assessment of compensatory damages against the employer could provide a satisfactory remedy.

14. The question raised by counsel for the employer is essentially whether Mr. Patenaude has the status to refer this grievance to adjudication. I have little difficulty in determining this question. The employer made an offer to Mr. Patenaude which laid down the condition of a probationary period. Mr. Patenaude claimed that the probationary requirement was contrary to the collective agreement (Letter of Understanding 6-78). He recorded this claim at the bottom of the acceptance form that he was required to fill out. The evidence shows that he returned the acceptance form on or about September 18, 1978. While the oral evidence about consultations, subsequent to September 18, between Patenaude and some of the persons involved in staffing is not altogether complete, it is clear that sometime between September 18 and October 3, 1978, Patenaude filed his grievance. It was subsequent to the filing of his grievance that he was informed, by letter dated October 3, 1978, that all staffing action with respect to the offer of appointment would remain in suspension pending the final resolution of his grievance. It is thus clear, on the record, that Patenaude was not appointed because of the disagreement between him and the employer as

to the interpretation of the Letter of Understanding 6-78. In my opinion, the fact that Patenaude was not appointed to the position, or that his acceptance, with the notation referring to the Letter of Understanding, was found to be a nullity (Patenaude and Letellier de St-Just, supra), is not relevant to the question of his status to refer this grievance to adjudication. As the grievor's counsel put it, Patenaude did not get the job because of the employer's interpretation of the collective agreement. It would be a case of "Catch 22" to argue that he would have had to have been appointed to the position in order to grieve the interpretation, the very questioning of which was the reason for denying him the appointment. I am further reinforced in my view that Mr. Patenaude has the necessary status to refer this grievance to adjudication by the observation of the Board in Patenaude and Letellier de St-Just (supra) at page 18:

In our opinion, there is no need for us to determine the scope of Letter of Understanding 6-78 dated January 27, 1978 and appended to the collective agreement. Nor is there any need for us to determine at this point whether or not the employer was justified in imposing a twelve-month probationary period. The grievance that was filed by Jean-Luc Patenaude (it was he who ultimately filed it and not Michel Letellier de St-Just) should settle this question.

15. Counsel for the employer quite rightly argued that, in the circumstances of this case, it would not be open to the adjudicator to render a decision the effect of which would be to appoint the grievor to a particular position. This does not mean, however, that I would be unable to fashion a remedy if I were to find that the Letter of Understanding had been applied incorrectly to, and to the detriment of, the grievor. The decision of the Federal Court of Appeal In re Public Service Staff Relations Board decision dated May 3, 1978

(File: 166-2-3077) [1979] 1 F.C. 730, and the subsequent awarding of damages by the adjudicator in the Singh case (File 166-2-3077, decision no. 3) are, in my opinion, sufficient authority for me to proceed with the instant reference.

16. Proceeding to the merits of this case, at the hearing of August 27, counsel for the employer agreed to adduce his evidence first in order to accommodate the grievor's counsel. It was understood, however, that the burden of proof remained on the grievor. I was rather puzzled by the kind of evidence adduced by both counsel and, after reflection, found that most of it seemed to be either irrelevant or inadmissible. I shall therefore deal with it quite summarily.

17. Mr. Hamel called on Mr. Jean-Yves Dupré, Chief of Air Traffic Control, Quebec Terminal, to give evidence of the practice with respect to the so called "check-out" requirement for new incumbents of air traffic control positions. Ms. MacLean did not challenge the admissibility of this evidence. Mr. Dupré stated that for air traffic controllers at the "working level" successful candidates must undergo training until they can prove their qualifications (i.e. check-out) for the new position. The formal appointment is made after they have checked out. In the case of supervisors, however, the practice is different. They are appointed to their supervisory position first and undergo a period of familiarization or refamiliarization on the job. The reasons why they are not checked out before appointment is because they normally already have the endorsement on their license for the unit concerned and merely require a limited period of training on the job in order to familiarize themselves.

18. Ms. MacLean called on Mr. Patenaude who testified that when he was assigned to the acting position of Terminal Shift Supervisor as of

June 1, 1978, it was his understanding that he would have to check-out in this acting position. He expected that upon the completion of the check-out he would receive an offer as Terminal Shift Supervisor retroactive to June 1, 1978. He considered this to be part of a general policy which was that there could be no appointment before check-out. There followed some further testimony from Mr. Patenaude about the training and familiarization of supervisors and about discussions between Patenaude and some of his superiors subsequent to his removal from the acting position of Terminal Shift Supervisor, about October 19, 1978 (Exhibit E-3). While this latter testimony might have a bearing on the ultimate resolution of Mr. Patenaude's problem, it is not relevant to the issue before me which is the application of the Letter of Understanding 6-78 to the facts of this case.

19. It was at this stage in the proceedings that the parties requested an adjournment sine die to allow them to explore the possibility of a settlement. They apparently failed to effect a satisfactory settlement and a third day of hearing was held on October 31, 1979.

20. Counsel for the grievor briefly reviewed the evidence that had been adduced up to that point. She claimed that by leading evidence to show that check-out requirements for supervisors were, in practice, different from those for working level air traffic controllers, the employer was seeking to establish that the Letter of Understanding 6-78 was not intended to apply to supervisors. This position was not acceptable to the grievor who was in no doubt that the Letter of Understanding was applicable to the appointment as Terminal Shift Supervisor. Counsel argued that in light of this seeming ambiguity as to the meaning of the Letter of Understanding she should be allowed to adduce extrinsic evidence by calling on the parties who signed the Letter of Understanding - Messrs. Dawson and Robertson - to testify.

21. Not surprisingly, Mr. Hamel objected to the admissibility of this extrinsic evidence on the grounds that there was no latent ambiguity in the language of the Letter of Understanding. I suggested to him that he had himself adduced what might be considered extrinsic evidence of past practice with respect to the check-out of supervisors in order to support his particular interpretation of the Letter of Understanding. In any case, I reserved on the question of admissibility of the evidence which Ms. MacLean wished to adduce, but I allowed only one substantive question to be put to Messrs. Dawson and Robertson - whether in the course of negotiating the Letter of Understanding there had been any explicit reference to supervisors' appointments as distinct from appointments to working level positions. Both replied to this question in the negative.

22. In light of my own conclusion that the Letter of Understanding, taken in the context of the collective agreement, is clear and free of ambiguity, no weight will be given either to the evidence of past practice that was adduced by Mr. Hamel, or to the admittedly extrinsic evidence of Messrs. Dawson and Robertson that was adduced by Ms. MacLean. I would add that even if this evidence were admitted, it would be of no assistance in interpreting the Letter of Understanding.

Reasons for Decision

23. The clear and simple issue before me is whether the Letter of Understanding 6-78 attached to the collective agreement between the Treasury Board and CATCA (Code: 402/78) had been correctly interpreted and properly applied by the employer in the offer of appointment to the grievor. The grievor's position is that a shift supervisor is an Air Traffic Controller in the meaning of that term as it is used in the Letter of Understanding. Therefore the only probationary period

applicable to him is that which is set out in the Letter. The requirement for a different period of probation for the "administrative" aspects of a supervisor's duties constitutes a breach of the collective agreement. The employer's position is that the shift supervisor's position is not covered by the Letter of Understanding, and that even if it were (which is not conceded) the distinction for purposes of probation between the operational and administrative aspects of a supervisor's duties is a valid one. The job descriptions for a Terminal Shift Supervisor (Exhibits E-4 and G-4) show that only about 30% of the supervisor's time is attributed to operational duties, the balance of the time being required for supervision and administration. Mr. Hamel argued that it goes against the whole idea of probation to apply it to only a fraction of a person's duties. He referred to the discussion in Brown and Beatty, Canadian Labour Arbitration, 1977, at pages 385-6.

24. Assuming that I have correctly answered the preliminary question of jurisdiction that was raised by counsel for the employer, it remains for me to analyse the language of the relevant parts of the collective agreement. It is not my duty to judge the wisdom of these provisions or the elegance of their draftsmanship. Nor am I concerned with their consistency with policies or practices of the employer elsewhere.

25. The paragraph in the Letter of Understanding that is in question is as follows:

It is agreed that the period of probation for Air Traffic Controllers who must successfully complete classroom and/or on-the-job training prior to their appointment to a position shall terminate on the date of the check-out. (Emphasis added)

In order to determine whether the term "Air Traffic Controllers" includes Terminal Shift Supervisors it is necessary to go to the definitions

section of the collective agreement and to examine the use of the relevant terms in various articles of the collective agreement.

26. It should be noted that the collective agreement covers the Air Traffic Control Group (All Employees), i.e. it includes both supervisory and non-supervisory employees. Appendix "A" of the agreement, which is a schedule of the rates of pay for all members of this bargaining unit, makes no distinction between supervisory and non-supervisory employees. The word "supervisor" does not appear anywhere on this schedule. The pay scales are related to classification levels that range from AI-00 to AI-7. We have seen, in the evidence, that if Mr. Patenaude had been appointed as a Terminal Shift Supervisor he would have moved from the AI-3 level to the AI-4 level.

27. The definitions on page 1 of the agreement include the following:

Unless specified elsewhere in this Agreement, the following definitions will apply throughout this Agreement:

- (1) For the purpose of this Agreement the following shall be considered as operating employees:
 - (a) all shift supervisors and controllers in Area Control Centres and Terminal Control Units;
 - (b) all shift supervisors and controllers including Unit Chiefs who are required to perform Control duties in Control Towers;
 - (c) all shift supervisors and co-ordinators in the Airspace Reservation Co-ordination Office;
 - (d) all Air Traffic Controllers-in-Training in Area Control Centres, Terminal Control Units or Control Towers;

(e) Performance Development Officers and
Data Systems Co-ordinators.

All employees other than those listed
above shall be considered non-operating
employees. (Emphasis added)

It is evident from this definition that where it is necessary to distinguish shift supervisors from controllers, or shift supervisors from other operating employees such as Unit Chief or Airspace Reservation Co-ordinators, etc., the definition provides the language that is to be used. Where there is a reference that is applicable to all members of the bargaining unit the collective agreement simply states "employees". In a limited number of provisions a distinction is made between operating and non-operating employees. A good illustration of the use of these distinctions is found in Article 8 of the collective agreement which deals with "Training".

28. There is one article, however, that uses the term "Air Traffic Controller" and it is clear from the context that this term is used generically. That is, it includes all those who come under the definition of "operating employees". Article 6.01 reads as follows:

At any administrative inquiry, hearing or investigation into an operating irregularity, where the actions of an Air Traffic Controller may have had a bearing on the events or circumstances leading thereto, and the Controller is required to appear at the administrative inquiry, hearing or investigation being conducted into such irregularity, he may be accompanied by an employee representative of his choice.
(Emphasis added)

There can thus be no doubt that a Terminal Shift Supervisor is included in the term "Air Traffic Controller" as that term is used in the collective agreement.

29. The only other place in which this term is used in the generic sense is in the Letter of Understanding 6-78. The probationary period referred to in this letter is applicable to "Air Traffic Controllers" and this term must be interpreted to include Terminal Shift Supervisors. This is the only conclusion that can be drawn from the language of the collective agreement. If the parties had intended to exclude shift supervisors or other operating employees from the application of the Letter of Understanding there was clear language in the definitions section of the collective agreement available for this purpose. Indeed, the last paragraph of the Letter of Understanding does specify an exclusion where it states that its provisions are not applicable to "air traffic controllers in training (AI 00)."

30. We have seen that the Deputy Minister of Transport took the necessary steps to exercise his authority to waive or reduce prescribed probationary periods in keeping with the Letter of Understanding (Exhibit G-2). One might argue that the Letter of Understanding applied only to the aspect of "classroom and/or on-the-job training" and that there could be additional probationary requirements with respect to other aspects. Such an interpretation would place an unreasonable strain on the language. It would require an inference that runs counter to the basic thrust of the Letter of Understanding which is to limit the probationary period. If the parties intended the Letter to cover only a part of the probationary requirement they should have stated it in clear and unequivocal terms.

31. Finally, there is the argument that the job of a Terminal Shift Supervisor comprises both operating and administrative aspects, and that the Letter of Understanding could only be applicable to the operating aspects. This distinction was made in the letter of offer to Mr. Patenaude (Exhibit E-2). The argument is not without interest

from a conceptual point of view, but it cannot be sustained by the language of the collective agreement. We have seen that all shift supervisors are included in the definition of "operating employees". There is nothing in the collective agreement that distinguishes employees in terms of the proportion of the "operational" aspects and the "administrative" aspects of their functions. The only distinction in the collective agreement is between operating and non-operating employees.

32. I might add at this point, although it does not go to the question of interpreting the collective agreement, that I have examined the job descriptions (Exhibits E-4 and G-4) and found that Mr. Hamel's distinction between operational duties, on the one hand, and supervision and administration, on the other, is somewhat arbitrary. It seems to me that supervision is an operational responsibility of a supervisor and if, in this case, it is added to the operational side of Mr. Hamel's equation (which ascribes only 30% to operational functions), it would leave no more than 15 to 20% on the administration side. I daresay that one would be hard put to find a job requiring a high level of technical competence that does not have an administrative component.

33. For all of the above reasons, I find that the employer did not conform to the undertaking it made in the Letter of Understanding 6-78 (collective agreement between TB and CATCA Code: 402-78) when it imposed certain conditions in its offer of appointment to Mr. Jean-Luc Patenaude, to wit: "a probationary period of twelve (12) months for the administrative aspects of your duties as a supervisor." Mr. Patenaude's grievance must therefore be allowed.

34. At the end of her oral submission, counsel for the grievor proposed that if I found in favour of the grievor I might consider making a declaration to this effect while reserving my jurisdiction to provide a remedy. The parties, in the meantime, would attempt to reach a settlement. Counsel for the employer indicated his agreement. Accordingly, I declare that the grievance is allowed; I retain jurisdiction to award relief to the grievor in the event that the parties are unable to come to a satisfactory settlement. It is open to the grievor, if and when he sees fit, to request that I exercise this jurisdiction.

For the Board,

S.J. Frankel,
Board Member
and Adjudicator.

OTTAWA, November 30, 1979.

